

Citation for published version:

Aslam, MW 2011, 'A critical evaluation of American drone strikes in Pakistan: Legality, legitimacy and prudence', *Critical Studies on Terrorism*, vol. 4, no. 3, pp. 313-329. <https://doi.org/10.1080/17539153.2011.623397>

DOI:

[10.1080/17539153.2011.623397](https://doi.org/10.1080/17539153.2011.623397)

Publication date:

2011

Document Version

Peer reviewed version

[Link to publication](#)

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<http://www.tandfonline.com/10.1080/17539153.2011.623397>

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ARTICLE

A critical evaluation of American predator strikes in Pakistan: Legality, legitimacy and prudence

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(Received 12 January 2011; final version received 24 August 2011)

This article critically evaluates the American counterterrorism strategy of carrying out predator strikes in the tribal areas of Pakistan to enquire whether undertaking these actions could be described as a responsible policy. The analytical framework is introduced through the idea that, being a great power, the United States has a responsibility to act legally, legitimately and prudently. This framework is then applied to the current case-study. The analysis concludes that it is not possible to classify the said policy as a responsible one.

Keywords: Pakistan; drone; great power responsibility; legality; legitimacy; prudence

Introduction

The 2001 terrorist attacks in New York and Washington DC were instrumental in shaping the current US foreign policy towards Pakistan. Shortly after these attacks, Pakistan's former President General Pervez Musharraf was asked to decide whether he wanted his country to side with the US or against it (Reid 2006). General Musharraf chose to side with Washington in its war against terrorism. As a result, the US switched its policy of keeping a distance from Islamabad – largely followed during the 1990s in response to the latter's work on its controversial nuclear programme – to taking a more inclusive stance towards the Pakistani government (see Kux 2001, pp. 308-16 and pp. 321-358). The decision of the Musharraf regime helped Islamabad receive generous financial and diplomatic support from Washington in order to help in the Bush administration's war on terrorism.

Soon, however, doubts emerged concerning Islamabad's commitment to this effort. Pakistan's all-powerful intelligence agencies, along with its army, were criticised for playing a 'double game' with the Americans (as quoted in Jones 2009, p. 248). This criticism was levelled on the basis that, on the one hand, the Pakistanis claimed to be fighting the war on terrorism but on the other were signing peace deals with militants (BBC News 2006) aligned with the Taliban as well as providing covert support to militants conducting activities against the US and NATO forces engaged in Afghanistan (see Gall 2008). This led to Washington taking matters into its own hands and implementing the policy of conducting unmanned predator strikes in the tribal areas of Pakistan, officially known as the Federally Administered Tribal Areas (FATA). This ever-increasing use of (mostly preemptive) CIA-led predator strikes was intended to

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conduct targeted killing of the terrorists and terrorist suspects who, the United States claimed, were hiding there. These missile strikes not only killed the terrorist suspects wanted by Washington, they also killed those wanted by other states – such as Rashid Rauf, alleged mastermind of the 2006 plan to blow up airliners departing the UK for the US (BBC News 2008b). The drone strikes were only one component of American counterterrorism policy as it continued to officially back the Pakistani efforts supporting it in its war against terrorism. This remains the United States official policy today. Islamabad has repeatedly condemned the American actions within the boundaries of Pakistan. It has recalled the US ambassador to its Foreign Ministry multiple times to register its protest but nevertheless the strikes continue (see BBC News 2008a).

In his defence of drone strikes, General David Petraeus, the former head of the US Central Command, stated that by conducting these strikes, the US was actually *helping* Pakistan. In a meeting with Pakistani officials, Petraeus insisted, ‘We are helping you also by hitting your bad guys. Besides, collateral damage in such strikes is minimal’ (Khan 2008). In justifying American raids inside Pakistan, former United States Secretary of Homeland Security, Michael Chertoff, argued that ‘international law must begin to recognise that part of the responsibility of sovereignty is the responsibility to make sure that your own country does not become a platform for attacking other countries...There are areas of the world that are ungoverned or ungovernable but nevertheless technically within the sovereignty of boundaries. Does that mean we simply have to allow terrorists to operate there, in kind of badlands...?’ (Dawn 2008). Chertoff also said that ‘international law should accommodate a country’s need to deter a possible threat abroad even if it meant taking pre-emptive action’ (see Dawn 2008).

It is noteworthy that this approach adopted by the Washington officials, which expanded the right of self-defence to include the right to act preemptively within the boundaries of another sovereign state, has been justified on the basis of common norms of an international society in which states have some ‘rights’ and some ‘responsibilities.’ The implication of Chertoff’s and Petraeus’s statements was that by targeting militants inside Pakistan, wanted by Washington and by other countries, the US was acting as a responsible great power. The fact that American missiles have targeted terrorists wanted by other countries and America’s justification for doing so is based on its ‘rights and responsibilities’ brings into focus the country’s global responsibilities and suggest that the United States is acting on behalf of the international community and global peace and not for its self-interest alone.

Hence the central question of whether the decision to strike terrorist suspects within Pakistan could be described as the action of a responsible great power is of significant importance if one is to study the implications of this policy for US-Pakistan relations in the near future and for the US-led war on terrorism on the whole. In order to examine this issue critically, this article will employ three oft-utilised yardsticks assessing the way states are expected to behave in international society: legality, legitimacy and prudence.

The great power responsibility to act legally, legitimately and prudently

The idea of great power responsibility has been the focus of many International Relations (IR) writers (see Bull 1979-80; Bull 1977, pp. 205-227; Morris 2005; Simpson 2003; Jackson 1998). Some have rightly asked whether great powers have great responsibilities (Brown 2004). Bull (1977, pp. 225-227) expected great powers to act as guardians of international society. In keeping with these ideas, the United States would have a responsibility to act according to the standards of day-to-day behaviour in international society,¹ and acting legally is the foremost of these standards. This is the first yardstick against which the current case-study will be examined.

Although international law plays a key role in the functioning of international society, there may arise a situation when it can emerge as a hindrance to international order rather than a contribution (Bull 1977. p. 143). Counter-intuitively it may be essential to ignore law to ensure

order (Bull 1977, p. 143) – hence, an action may be illegal but simultaneously legitimate (see Newman 2002, p. 115). Distinguishing legality from legitimacy, Georgive (1993, p. 12, emphasis in original) argues that unlike legality, the idea of legitimacy ‘denotes accordance with basic *principles* of law, and not with all specific rules of law.’ Concerning legality, an action can be either legal or illegal, the distinction of legality is relatively clear. For Georgive (1993, p. 12, emphasis added), legitimacy

...[H]aving the connotation of the ‘contestable validity claim’, is capable of referring to something which has the *potential* of being ‘legal’ and yet *is not, not yet*, or not fully recognized as being ‘legal’. It has the potential of being ‘legal’ because it corresponds to certain rules or principles which are perceived as basic but yet the claim, because of various circumstances, is not being recognized, so it does not have ‘real’ legality. ... Legitimacy, unlike legality refers to the ‘ought’ and not just to the ‘is’ of law. Moreover, one could say that it incorporates the ‘ought’ into the ‘is’ of law. Legitimacy implies contradictions, tensions and unrealized potential which the distinction legal-illegal does not recognize as existing within the law.

Wheeler (2004, p. 213) also addressed the ‘indeterminate’ nature of law, arguing that it would be a ‘fantasy to think that there is an objective or proper view of the law that good men and women of sound legal reasoning apply.’ He has highlighted the need to look at law not as a set of ‘rules’ but as a ‘process’ (Wheeler 2004, pp. 191-196) because ‘[v]iewing international law as the application of the “correct legal view” is open to the charge that this makes it unresponsive to changing progressivist values in global society’ (Wheeler 2004, p. 192). In other words, an action can be illegal if seen according to the strict rules of law but a different picture may emerge if it is seen in its proper context keeping in minds ‘established, codified normative precepts’ (Wheeler 2004, p. 195).

NATO’s use of force against the Federal Republic of Yugoslavia (FRY) in 1999 was not legal if evaluated against the specific rules of Article 2(4) and Article 51 (Wheeler 2004, p. 194). But, according to Wheeler (2004, p. 194) if it is viewed in accordance with the ‘moral purposes’ of the UN Charter and international law and the factual circumstances, such as the crimes against humanity and previous UN Security Council Resolutions (UNSCRs), ‘a different verdict emerges.’ Hence, for Sofaer (according to Wheeler 2004, p. 194), ‘none of the individual factors that could be cited in support of the use of force carries enough weight by itself.’ But if seen together, the use of force was “reasonable in the light of the Charter’s provisions and purposes” (Sofaer 2000, 15 quoted in Wheeler 2004, p. 194). The idea of an action being ‘reasonable’ and not strictly legal is what falls under the definition of a legitimate action. Elsewhere Wheeler (2000b, p. 161) argues that in future there may be a process of moral cascade that may make actions like unilateral humanitarian intervention legal but for the time being any ‘modification of Charter norms is not possible in a General Assembly dominated by non-democratic regimes which are jealous of their sovereign prerogatives.’ In other words, actions can have the potential to be legal, as Georgive (1993, p. 12) argued, but they may not *yet* be legal. This is an argument that definitions of legitimacy cover. In his seminal work *Legitimacy in International Society*, Clark (2005) discusses what it would mean for an action to be legitimate. Among other things, for him, the presence of a consensus in support of an action grants it legitimacy in international society. Clark (2005, p. 164) argues that ‘consensus is important because it is the means by which society articulates its most basic purposes and values. Consensus is the benchmark of legitimacy in so far as it corresponds with these values.’ After legality, legitimacy is the second yardstick from whose perspective this article will evaluate the American drone strikes in Pakistan. Focusing on consensus as Clark’s benchmark of legitimacy, it will enquire whether there exists sufficient consensus behind this policy that may grant it a degree of legitimacy.

Along with acting legally and legitimately, a great power has a responsibility to act prudently (Jackson 2000, p. 153). When employed, prudence can help impart a degree of

foresight to the decisions taken by a great power, enabling it to foresee the consequences of its own actions – a crucial component of the attribute. According to Coll (1991, p. 43), ‘prudent statesmen are not solely concerned with having the right intentions; they also weigh carefully the consequences of their actions.’ If these consequences have a key role to play in determining the quality of that action, it means that ‘[t]here can be no political morality without prudence; that is without consideration of the political consequences of seemingly moral action’ (Morgenthau 1993, p. 12; see also Jackson 1998, p. 6).

American predator strikes: What are they?

The American attack on Afghanistan in 2001 forced many Taliban fighters to take refuge across the border in Pakistan’s tribal areas. FATA is divided into seven tribal agencies (and a further six frontier regions, or FRs) out of which three agencies, Bajaur and North and South Waziristan, have ‘a history of religious conservatism’ (Jones 2009, p. 27). The Taliban fighters and their al-Qaeda counterparts found refuge in these agencies in 2001 (Jones 2009, pp. 27-30), and these areas were subsequently used by these fighters not only to target American forces inside Afghanistan but also to attack the NATO supplies traversing them into Afghanistan and to plan attacks globally (Jones 2009, p. 27; Doucet 2011). Some of the militants and their Pakistani allies, the Pakistani Taliban, even used FATA territory as a launching pad to attack Pakistani targets for collaborating with the United States in its war on terrorism (for details of specific militants in FATA see Tohid 2010).

Despite their agreement to cooperate in the war on terrorism, the Pakistani army proved either unwilling or unable to attack *all* militants hiding in FATA. For example, it emerged that the Pakistan army did not want to target the Haqqani group of the Afghan Taliban, as it had long considered this group a strategic asset in assisting in its own meddling in Afghanistan (Gall 2008). Other militant groups operating in Pakistan’s tribal areas that are not targeted by Pakistani state include Lashkar-e-Taiba, that has a long history of waging jihad in Kashmir with the support of the Pakistan army (see Roggio 2009; Tankel 2010; see also Jones 2009, p. 41). Unsurprisingly, support that the army and its military intelligence services extend to militants has been hotly debated. The premier intelligence service of Pakistan, the Inter Services Intelligence Agency (or ISI) has long been criticised for its alleged links with militants in the country’s tribal areas. Two views surround the ISI’s involvement with these groups. The first holds that the ISI is ‘a rogue agency’ (Jones, p. 247) that acts outside of the regular chain of command and the army struggles to bring these operators under control – thus the idea that the ISI may be supporting militants in FATA on its own without orders from the army. The other, more persuasive approach is that the ISI is a disciplined intelligence agency firmly under the command of the Pakistan army strictly following orders from the high command (see Bajoria 2011). Owen Bennett Jones (2009, p. 247) argues that ‘[w]hensoever it has backed Islamic militants, the ISI has been following orders and implementing Pakistani state policy.’ Jones (2009, p. 248) goes on to point out that the ‘impression that the ISI is out of control has offered successive Pakistani governments a welcome degree of plausible deniability,’ in that the ISI can be used as a tool to meddle in other nation’s affairs (specifically India and Afghanistan) whilst the governments publicly deny any knowledge of this.

The issue of Pakistan’s inability to act against *all* terrorists in FATA has also been complicated by the fact that these areas have always been under nominal control of Pakistan (Jones 2009, p. 26). The state apparatus in Pakistan simply lacks the ability to conduct meaningful counterterrorism operations there due to its history of independence predating the foundation of the state. As a result of this factor, among others, Pakistani efforts to eradicate terrorists in FATA were often seen by Americans as half-hearted at best. The American policy to strike targets in FATA using predators evolved in these circumstances (for a comprehensive background of these attacks see Williams 2010). Roggio and Mayer (2009) have argued that ‘[f]irst and foremost, the primary objective of the air campaign has been to disrupt al Qaeda’s

external network and prevent the group from striking at the US and her allies.’ Other purposes of the strikes include ‘to disrupt the Taliban operations in Afghanistan’ and to attack ‘Pakistani Taliban commanders who threaten the stability of the Pakistani state’ (Roggio and Mayer 2009).

These strikes have been conducted by the CIA from bases in Afghanistan and Pakistan, but the agency is also reported to have employed private security firms to load missiles onto drones (Risen and Mazzetti 2009). The CIA generally uses MQ-1 Predator drones built by General Atomics Aeronautical based in California, USA (Williams 2010, p. 872). According to the New America Foundation (2011a), which has compiled a comprehensive database of these attacks, the first drone strike in Pakistan took place in June 2004. The number of attacks increased gradually, and from 2004 through the end of George W Bush’s second term as US president a total of 44 strikes were conducted (Bergen and Tiedemann 2011).

The Obama administration authorised a substantial increase in the frequency of these attacks, with the first strike taking place within hours of President Obama’s inauguration (Reid 2009). According to the New America Foundation (2011b) there were a total of 53 strikes in 2009, 118 in 2010 and 53 strikes through 10 August 2011. Some of the high-value targets claimed by these strikes include: Saad bin Laden (2009), the son of Osama bin Laden, with alleged involvement in attacks in North Africa; Baitullah Mehsud (2009), then-leader of the Pakistan Taliban who was fighting against Pakistan’s security forces; Abu Laith al Libi (2008), who was behind the suicide bombing at Begram airbase in Afghanistan during former US Vice-President Dick Cheney’s visit there; and Rashid Rauf (believed killed in 2008), who masterminded the plan to blow up mid-air flights en route from London to destinations in the United States (Williams 2010, p. 878). These attacks have taken place throughout FATA but the vast majority have been in either North (68.18%) or South Waziristan (25.38%).²

Whilst many high-value targets have been eliminated using these strikes, the drone attacks have also targeted many civilians (Bergen and Tiedeman 2009; Williams 2010, p. 875). The issue of civilian casualties is one of the controversies surrounding these attacks (see for example Shah and Beaumont 2011; also Bergen and Tiedemann 2010; Bergen, Doherty and Ballen 2010; Taj 2010). The inadvertent targeting of innocent citizens, regardless of the exact number, raises cogent questions related to *jus in bello* along with *jus ad bellum*. The casualty count remains subject to speculation but Bergen and Tiedemann (2010, p. 1) argue that ‘as many as 10 militant leaders fell to the drones in 2009, in addition to hundreds of lower-level militants and civilians.’ However, the New America Foundation (mentioned in Dilanian 2011) suggests that the number of civilians killed by drone attacks is, in fact, decreasing with time: specifically, ‘the level of noncombatant deaths dropped from 25% of the total in prior years to an estimated 6% in 2010.’ The discussion will return to this aspect of the drone programme below.

The predator strikes are used by the US purportedly as a self-defence mechanism with both a preemptive and a preventive element. They have targeted not only those who conducted attacks against the US or its allies, such as Abu Laith al Libi, they have also targeted others like Rashid Rauf who may be preparing to do so imminently or at some point in the future (BBC News 2008b). Given that FATA is a highly inaccessible area and that the count of casualties from each and every attack may not be verifiable, it would be almost impossible to find out how many of those targeted by predators were killed either preemptively or preventively.³ Arguably, in the absence of any trials, most of the strikes can be described as preemptive or, at best, preventive strikes.

The legality of predator strikes

While discussing the legality of cross-border attacks on Pakistani territory by the United States, Murphy (2009, p. 18) contends that such attacks could be legal if they were taken in the following circumstances: with explicit ‘consent by the Pakistani government;’ under ‘the authorization by the U.N. Security Council;’ as self defence against ‘non-state actors operating from Pakistan;’ or as ‘self-defence against Pakistan itself.’

Murphy (2009, p. 13) has categorised the drone attacks as one type of these cross-border attacks conducted by Washington inside Pakistani sovereign territory. There are other examples of such attacks, such as the ground incursions conducted in order to pursue the Taliban who attack the coalition forces inside Afghanistan and return back to hide in Pakistan, and covert special-forces operations inside Pakistan to apprehend suspected terrorists there (Murphy 2009, p.13). The Pakistani government has vehemently and categorically criticised the ground-level incursions and covert operations within its territory and has made it quite clear that the US has conducted such operations without its permission (Murphy 2009, p. 15, p. 17). The issue of drone attacks is relatively less clear and, according to Murphy (2009, p. 18), they could be legal if they have been authorised by the Pakistani government – indeed some attacks are even conducted from Shamsi airbase in Baluchistan (Page 2009). Assuming that they are taken with the permission of the Pakistanis, these strikes would be considered legal because ‘standard rules on state responsibility accept that conduct does not violate an obligation to a state if that state has consented to the conduct’ (Murphy 2009, p. 18). The *Washington Post* (Ignatius 2008) has stated that there exists a tacit agreement between the United States and Pakistan holding that Pakistanis will ‘look the other way’ when the US attacks (see also Murphy 2009, p. 19). This issue, being of a highly nuanced yet very significant nature, needs to be examined in greater detail.

Unlike Western democracies, the grip of the military on the political process in Pakistan is significant (Sheikh 2008). The political leaders have never been able to command as much influence on the country’s destiny as their military counterparts. As concerns the drone strikes, the democratically elected prime minister and the president of Pakistan have repeatedly condemned these attacks and have strictly challenged the assertions that they may have been authorised by the Pakistani government (Press Trust of India 2009). There may be an agreement between the Pakistani military and the American government on the issue but such an arrangement would render the legality of the undertaking quite dubious as it is, at least in theory if not strictly in practice, the democratically elected government and not the military leadership that possesses the legitimacy to grant permission for such attacks (Murphy 2009, p. 21). One can claim that the democratically elected leadership may be lying to the public and behind closed doors have authorised such actions; this is certainly a possibility, but in the absence of any openly accessible legal document (Murphy 2009, p. 19), legality can only be judged on the basis of information fully available to public scrutiny.

It is also well documented that after the 2001 attacks, Pakistan was told by Washington to cooperate in the war on terrorism or prepare itself to be bombed ‘into the Stone Age’ (Reid 2006). In such circumstances, it can be inferred not only that there is a lack of clear proof that the drone attacks have been conducted with the permission of the Pakistani government, but also if the Pakistanis have preferred to ‘look the other way’ in the event of such attacks, it would be an unconvincing argument to say that Pakistan has given permission for these attacks on the basis of its own free will – especially when faced with such a threat as above. Furthermore, given that the Pakistani government is dependent on the financial assistance of the United States for the running of its day-to-day affairs, it has little chance of standing up to its major funding partner in order to stop these strikes (The Nation 2009a). In brief, the legal justification of drone strikes on the basis that these attacks may have been in response to a call for help by the Pakistani government (or with its permission), can be labelled ‘dubious’ at best. The story would be different had these attacks been authorised by the Security Council. For its part, the Security Council authorised many resolutions concerning the situation in the region after the attacks of September 11 but none of them can be put forward as authorisation to conduct drone strikes in Pakistan (Murphy 2009, p. 23).

The legality of drone attacks may be proven according to Article 51 of the UN Charter that may allow the US to respond to cross-border militant attacks aimed at targeting the coalition forces in Afghanistan. In this particular case, the US attacks ‘might be seen as today still defending against Al Qaeda’s attacks of 9/11’ (Murphy 2009, p. 28) or as responses to ‘the more

recent cross-border raids into Afghanistan by militants based in Pakistan ... to strike at U.S. or coalition forces, or the government of Afghanistan' (Murphy 2009, p. 29). For Murphy the legal basis for such strikes against Al Qaeda or the Taliban as response to the attacks of September 11th would be 'problematic' (Murphy 2009, p. 48). But they may be justified if they are conducted as acts of self-defence in response to specific (now frequent) attacks against the coalition forces in southern Afghanistan (Murphy 2009, p. 30 and p. 43) or as preemptive responses to deter imminent attacks. It is, however, noteworthy that, among others, American predators have also targeted militants (like Baitullah Mehsud) who have been fighting the Pakistani state and not against the coalition forces *per se*. This casts doubts on the legality of these attacks because use of drones is not always linked to specific attacks in Afghanistan. As far as preemptive action is concerned, a state may be allowed to act if it had 'no choice of means and no moment of deliberation,' as stated by a 19th century US Secretary of State Daniel Webster (quoted in Davies 2009, p. 433). This criterion, however, does not apply in the case of Pakistan where the US has conducted multiple attacks so far (Davies 2009, p. 433). Where one or two cases could be pointed out as meeting the criteria, it would be very hard to prove that each and every attack the US has conducted can fulfil the tough requirement as laid down by Secretary Webster. Davies (2009, p. 433) argues that 'the danger to the United States from terrorists in the Hindukush mountains is not "instant" or "overwhelming" but relates, as President Obama suggested, to what they may do in the future if they are allowed to maintain "safe havens" there.' In its inability to highlight but the vaguest of threats, this argument casts doubts on the legality of these attacks.

Finally, the legality of these actions could be justified as actions of self-defence against the attacks by Pakistani state itself (Murphy 2009, p. 45). They would be legal in the circumstances in which a relationship was proven between the Pakistani state and militants targeting America on the basis of the benchmark laid down by the International Court of Justice (ICJ) in the *Nicaragua Case* in 1986 (Waisberg 2009, pp. 480-1). The ICJ held that a state that suffers an armed attack by irregular forces from the territory of another state shall 'attribute the armed attack to [the] state' (Waisberg 2009, p. 481). But for the counteraction to be undertaken legally, there would have to be a 'relationship between the irregular force and the harboring state' that will 'reach a high degree of interdependence, so that the irregular force may be equated to other official state organs' (Waisberg 2009, p. 481; see also Murphy 2009, p. 31). By this logic, the American drones would be attacking sites within Pakistan legally if the US could make a clear case that there was a link of the nature detailed above, between the Pakistani state and *all* militants targeted within its territory. Stories abound of members of the Pakistani establishment collaborating with some militant groups. But there are many groups operating in that region, and indeed some of them are involved in open conflict with the Pakistan army itself as well as with the United States. Hence, every militant hunted by American predators is not an ally of the Pakistani state nor, indeed, its army.

The problem of legitimacy

The previous section has highlighted the difficulty of determining the legality of American predator strikes in Pakistan. This section enquires whether they could be classified as legitimate – an important distinction clarified earlier. It was demonstrated above how consensus is a benchmark of legitimacy; this section asks whether such actions indeed have any legitimacy by virtue of enjoying a consensus in the international community to act preemptively with the aim of thwarting attacks in the future.

The US *National Security Strategy* of 2002 outlined the terms under which America would act preemptively in the post-9/11 scenario. It was received throughout the world with much scepticism due to the stress it placed on acting preemptively against a threat that may possibly emerge in the future (Slocombe 2003). Such a reaction came about because the proposed ideas flew in the face of traditional conceptions regarding the use of force in international law. However, with the passage of time, the idea of preemptive action against those who may be

preparing to attack someone has been gaining gradual legitimacy (Dombrowski and Payne 2006) as members of the international society have come to realise that it may not be possible for a state to wait for threats – or indeed, action – to fully materialise before an attack should be mounted to avoid it (Beres 2008, p.699). The attack by Colombia inside the sovereign territory of Ecuador and that by the Turkish military in Northern Iraq (both in recent years) are examples of such actions that did not attract widespread condemnation in international society (Murphy 2009, pp. 34-35).⁴ In 2002, the former Secretary General of the United Nations Kofi Annan created a High-Level Panel on Threats, Challenges and Change with a view ‘to explore the UN’s role in promoting international security given the new vulnerabilities of the twenty-first century’ (Dombrowski and Payne 2006, p. 123). In its report it argued that

In the world of the twenty-first century, the international community does have to be concerned about nightmare scenarios combining terrorists, weapons of mass destruction, and irresponsible states and much more besides, which may conceivably justify the use of force, not just reactively but preventively and before a latent threat becomes imminent (quoted in Dombrowski and Payne (2006, p. 123).

According to (Dombrowski and Payne 2006, pp. 116-122), many states may be beginning to understand the need to deal with future threats preemptively. Along with the policymakers in Washington, the discourse surrounding preemptive attacks has been used at various times by leaders of the United Kingdom, France, Japan and Russia (Dombrowski and Payne 2006, p. 117-119 and p. 121). In an interview, Lord Robertson (2003), a former Secretary General of NATO, stated, ‘An aggressor needs to know that it will not simply be when he crosses a border or when he attacks to kill that something will happen. There has to be something much more flexible than that, and that has always been part of our policy.’ According to Robertson, NATO acted preemptively in Kosovo in 1999 to stop Milosevic from conducting ethnic cleansing, and further in Bosnia in 1995 and Macedonia in 2001.

Comparing the present-day situation in Pakistan with events in Kosovo serves some useful purposes. Some have argued that a consensus to use force existed in the case of the Kosovo crisis at the Security Council but Russia and China were acting in an ‘unreasonable’ manner by opposing action in order to save civilians (Ralph 2005, p. 4; see also Wheeler 2000a, p. 277, p. 279). The threat of a Russian or Chinese veto precluded the passage of a formal resolution to authorise the use of force. (Wheeler 2000a, p. 279). But even in the absence of a specific UNSCR, some leading NATO members present at the Security Council (specifically the UK, the USA, the Netherlands and Canada) insisted that previous UNSCRs, in particular nos. 1160, 1199 and 1203 (Wheeler 2000a, p. 275, p. 278), made NATO’s action legal. However, just because some nations regarded these actions as legal does not mean that every country supporting aerial attacks on Serbia considered NATO action to be strictly within the norms of legality. For example Germany did not try to justify the NATO action by referring to authority granted by previous UNSCRs. The German diplomats referred to the responsibility of veto-power states to ‘uphold standards of common humanity’ and, if this responsibility is abused by some members, ‘unilateral humanitarian intervention is justified on moral grounds, even if this breaks the law’ (Wheeler 2000a, p. 278). The Malaysian government, though supportive of the NATO action, also reiterated that need for acting outside of the Council due to ‘irreconcilable differences’ within the Security Council (Wheeler 2000a, p. 280). The Argentinean government also put forward views similar to Malaysia’s (Wheeler 2000a, p. 280).

In his examination of the legality of NATO’s actions, Wheeler (2000b, p. 155) suggests that a look at the arguments put forward by different alliance members leads one to conclude that NATO ‘was not so much taking existing law into its own hands as establishing a normative precedent that might itself become the basis of new law.’ This is an important distinction as it refers to something that, according to Georgie (1993, p. 12), ‘has the potential of being “legal” and yet is not, not yet, or not fully recognised as being “legal.”’ Hence NATO action would be

classified as one that is outside the norms of legality but would still be legitimate. It will be legitimate because it meets Clark's (2005, p. 164) important benchmark of legitimacy which is consensus. Thus in this particular case, there was a consensus behind NATO's actions that made it legitimate.

This claim regarding the presence of a consensus in NATO's favour can be substantiated by the fact that a draft resolution circulated by Belarus, India and Russia demanding a cessation of the 1999 bombing of FRY initiated by NATO was defeated by a vote of 12-3 – with only China, Russia and Namibia voting in favour (see UN Security Council Document S/1999/328, [26 March 1999]). In opposing the resolution, the representatives of the Canadian government argued that a support for the draft resolution would place states 'outside the international consensus, which holds that the time has come to stop the continuing violence' (quoted in Wheeler 2000b, p. 156). This means that the twelve members of the Security Council voting against the resolution wanted NATO to continue with its action, indicating indeed a consensus of sorts within the Security Council to do something to help the victims of Serbian aggression. Hence the report of the Independent International Kosovo Commission concluded that intervention in Kosovo was 'illegal but legitimate' (see Newman 2002, p. 115). It was illegal because there was no explicit UN authorisation behind the action, but legitimate nonetheless because there existed a consensus in the Security Council and the wider international community (as the Security Council is *the* forum for such discussions as according to the UN Charter it works on behalf of all UN member-states) to act against Serbia. This is the understanding of legitimacy to which Newman (2002, p. 117) refers when arguing that 'international law does not support a norm of humanitarian intervention outside Security Council authority – but political and moral arguments may bring legitimacy.'

Given this, is there a consensus in the international community that supports a preemptive use of predator aircrafts in the tribal areas of Pakistan (that may grant legitimacy to this policy)? In a situation where there may be an 'emerging consensus' (DeBrowsky and Payne 2006) for preemptive and preventive action among many member-states of the United Nations (and among members of organizations like NATO as well), it is significant that both NATO and America's major great-power ally, the United Kingdom, have failed to openly either support or condone the policy of conducting predator strikes in Pakistan (see Gardham 2009; The Nation 2009b). Registering 'apprehensions' about this policy, Germany has also declared its support for the Pakistani stance on the US drone attacks as Pakistan has argued that 'drone attacks in the tribal areas of Pakistan were counter-productive for they worked against Pakistan's efforts aimed at winning hearts and minds' (Syed 2009). The absence of open support from these two countries for such attacks by the United States is particularly noteworthy given that Britain and Germany are both major troop contributors in Afghanistan.

The work of the United Nations High-Level Panel on Threats, Challenges and Change is also a useful resource with which to analyse the level of support behind preemptive attacks in Pakistan.⁵ The panel argued that decisions related to the use of force (even preemptively) 'must take into account the seriousness of the threat, proper purpose, whether force is the last resort, proportionality of means, and the balance of consequences' (DeBrowsky and Payne 2006, p. 124; see also the UN Press Release 2005). However, the predator strikes in Pakistan tend to fail on almost all these measurements. For example, one significant element concerning the use of force is the idea of 'proportionality' As mentioned above, these attacks have directly caused the deaths of a large number of non-combatants (see Shah and Beaumont 2011; Woods 2011; see also Shane 2011), providing a main reason behind a lack of consensus supporting such attacks. In one such attack in the tribal village of Damadola, only innocent civilians were killed (and no al-Qaeda-linked combatants) leading to a huge international outcry (Whitlock 2007).

The targeting of non-combatants along with combatants is closely connected with the ideas of *jus in bello* (see Gross 2009, p. 103; see generally Coker 2008). An important issue related to the use of drone strikes is the ability of those operating these Unmanned Aerial

Vehicles (UAVs) to distinguish between civilians and combatants. Strawser (2010, p. 352) argues that the 'UAVs appear to have, in fact, greater technical capabilities at making determinations of combatant status.' Quoting Plaw's (2010) database on American drone strikes in Pakistan, Strawser (2010, p.352) goes on to state that the 'data shows that UAV strikes were far better at non-combatant discrimination than all other methods used for engaging Taliban fighters in the region.' Referring to Plaw's (2010) database, Strawser (2010, p. 352) writes:

... the UAV strikes resulted in a ratio of over 17 to 1 of intended militant targets to Civilian deaths compared with a 4 to 1 ratio for Pakistan Special Weapons and Tactics Teams team offensives or a nearly 3 to 1 for Pakistan Army operations in the same region during the same time period.

Others, though have expressed reservations about drones' abilities to attack terrorists. Davies (2008, p. 434), for example, argues that

[c]ases of illegal detention at Guantanamo, Bagram, and CIA prisons have demonstrated that U.S. intelligence agents are often unable to distinguish terrorists from innocent civilians, even when they are shackled to the floor right in front of them and their mental capacity to resist interrogation has been methodically broken down by ruthless and sophisticated forms of torture.

Referring to the predator strikes in Pakistan, Davies (2009, p. 434) argues '[T]he drone pilots who fire missiles in Pakistan from computer terminals at Nellis Air Force Base ... in Las Vegas operate at an infinitely greater remove from their victims and cannot possibly know for sure who they are firing at.' Where it may not be possible to know how many combatants and non-combatants are targeted by each and every drone strike, Davies's argument holds some weight as it is well known that many 'alleged terrorists' held by the United States in Afghanistan and Guantanamo Bay, Cuba have subsequently been released without charge.⁶

The issues of consequences and prudence

Having studied this policy through the prisms of legality and legitimacy, the argument now focuses on enquiring whether such an approach can be described as responsible from the perspective of prudence. As argued earlier, for it to be characterised as prudent, an action should be judged on the basis of its consequences, thus this section will enquire whether consequences of drone attacks are fruitful for the larger American counterterrorism strategy in the tribal region of Pakistan.

Culturally and socially, the tribal areas of Pakistan are uniquely different from the rest of the country as well as from the modern societies of the West. These areas are run on the basis of a set of tribal customs known as *pashtunawali*.⁷ One such tradition is known as *badal*, according to which it is imperative to kill those who kill one's own friends or relatives. As a result, the drone attacks that kill the innocent civilians may lead victims' (usually male) family members and friends to join militants active in those areas in order to take revenge upon the United States and its allies, the entities which they see as deserving of it. Hence, one consequence of such attacks is the creation of more enemies than one has eliminated in the first place (Nawaz 2008, pp. 544-5; see also Gross 2009, p. 114). Williams (2010, p. 882) recounts an incident in which one man rammed an explosive-filled vehicle into a Pakistan army convoy to avenge the death of four members of his family in a US drone attack.

Another consequence of these strikes is that they may be damaging the social fabric of the society in FATA. The predators can only attack on the basis of sound intelligence and in many cases that information comes from human sources operating in the territory (Khan 2011). It has become a routine for militants to execute individuals, labelled as 'spies,' in that area after drone attacks that may kill their companions but leave them alive (Roggio 2011). This contributes to damaging social cohesion and upsetting the traditional structures of a society, as each strike provokes a search to find those who may have taken part in facilitating it. This reaction against the 'spies' or 'those who recruit them... rend the moral and social fabric of the community'

(Gross 2009, p. 113). According to Gross (2009, p. 113), 'facilitated by spies, informers, compromised friends, and family members, assassination subverts strongly held beliefs about integrity, trust, honor, and loyalty that hold traditional societies together.' These negative effects on the social cohesion of the tribal societies contribute to the formation of an atmosphere of lawlessness and chaos in which terrorism and militancy thrive.

Harrison (2007), a prominent scholar of South Asia (and of Pakistan in particular), has pointed out that the American strikes in the tribal areas may be exacerbating the long-running separatist feelings among the Pashtuns on either side of Afghanistan-Pakistan border away from their respective host countries and towards each other. The Pashtuns in Pakistan have long decried the Punjabi-led government in Islamabad that, they claim, has deprived them of their rights. Traditionally, secular political parties such as the Awami National Party (ANP) have raised a voice for greater rights for Pashtuns – if not a clear-cut Pashtun independence (see Abbas 2007a). However the ANP being a partner in the governing coalition currently running Pakistan is thus regarded by Pashtuns as complicit with the current government in Islamabad. The US attacks on civilians have the potential to lead to a coalescence of religious militants and Pashtun nationalism, thereby creating, in the words of a Pakistani diplomat, an 'Islamic Pashtunistan' (Harrison 2007).⁸ As Harrison (2007) suggests, in unilaterally targeting these areas when the Pakistani government seems unable to protect the local population, 'the United States is inadvertently helping Al Qaeda and the Taliban capture the leadership of Pashtun nationalism.' If this happens, it would be far more difficult for the government of Pakistan, the United States and the international community at large to deal effectively with militancy in the tribal areas of Pakistan, as the various interests will have been combined, consolidated and strengthened.

As in some other tribally based societies of the world, the tribal areas of Pakistan are structured on a patriarchal basis in which clans and their chieftains are responsible for each member's safety and security. This is how peace was maintained in these areas before the foreign and Pakistani government's involvement in the area following the onset of the war on terrorism. The territory of FATA does not have the equivalent of police, and law and order has mainly been guaranteed by the tribal chiefs relying on the help of loosely-constituted tribal militias (see Abbas 2007b). However, in the current scenario, the drone attacks have caused a number of casualties without the tribal chiefs *or* the Pakistani government being able to protect the civilians. This, in turn, has resulted in the alienation of local people (Harrison 2007) whose help is considered significant in the success of the current war on terrorism – not an encouraging consequence of the policy of using drones. According to Pakistan's Prime Minister, the drone attacks sometimes end up uniting the tribesmen and militants. Addressing the National Assembly of Pakistan, Gilani (quoted in Times of India 2011) said,

Under a well thought out strategy, we had separated the tribesmen from militants. Whenever a drone attack is carried out, it unites the militants and the tribal people. This creates problems for the government because no war is won without the support of the people.

The drone strikes have also played an instrumental role in bringing together diverse groups of militants against their common enemy the United States and its ally Pakistan (Fishman 2011, p. 16) – and they would certainly not be so united in the absence of the attacks (Jones 2009, p. 41). Fishman (2011, p. 16) recounts how drone strikes were instrumental in the formation of an alliance between the leaders of three militant groups in 2009 that included Mullah Nazir, Baitullah Mehsud and Hafiz Gul Bahadur to fight against the Pakistan army. Mullah Nazir specifically mentioned that 'drone strikes in South Waziristan were an important reason he had turned on the Pakistani government' (Fishman 2011, p. 16). Thus, the effects of drone attacks can in no way be said to be contributing to the stated American objective of the country's involvement in that region: to tackle terrorism emanating from there.

The use of predator strikes is one of the reasons behind an increase in the number of terrorist attacks against Pakistani civilians and security forces throughout the country. Some of

the more active militants engaged against the Pakistani army have cited the drone attacks as a reason for 'bouts of violence against the Pakistani state' (Fishman 2010, p. 10). Pakistani society has been under constant attack by militants who are trained and equipped in FATA (Raja 2011). Indeed, hundreds of drone strikes have taken place over many years but the insurgency in FATA and in southern Afghanistan does not seem to be getting weaker (Bergen and Tiedemann 2011). Faisal Shehzad, recently apprehended after attempting to bomb Times Square in New York City explicitly stated that his action was a revenge for American drone attacks (see Leonard 2010). His claims and attempted attack underscore the radicalizing effect of this policy.

The drone attacks and the Pakistani government's inability to prevent them have implications for the stability of the institution of Pakistan army as well. According to Harrison (2007), former President Musharraf faced serious opposition from the Pashtun generals in the army for his alignment with America and his heavy-handed approach in dealing with militancy in the country's tribal areas. The continuation of the current approach is likely to lead to tensions within the army and any future break-up of the army could quite possibly bring about dissolution of the country itself. In such a situation, there will be no possibility of guaranteeing that Pakistan's conventional and nuclear arms remain in safe hands (Lieven 2010).

In yet another unintended consequence of the strikes, as they are only focused on the tribal areas of Pakistan, militants have been able to avoid them by moving to settled parts of the country. In other words, these attacks are literally helping in spreading militancy across Pakistan. As Byman (2009) notes, 'al Qaeda and the Taliban have been able to relocate parts of their apparatus further inside Pakistan, which may work to actually widen the zone of instability'—hardly a desirable consequence of this policy.

President Obama entered the White House with the goals of focusing on the war in Afghanistan and of helping Pakistan to become a stable and democratic sovereign state. To highlight his approach towards Pakistan, Obama (quoted in CFR 2009) argued:

To avoid the mistakes of the past, we must make clear that our relationship with Pakistan is grounded in support for Pakistan's democratic institutions and the Pakistani people. And to demonstrate through deeds as well as words a commitment that is enduring, we must stand for lasting opportunity.

However, one major consequence of the drone strikes has been to undermine that very goal of America's Pakistan policy. These attacks have often been criticised by the civilian leaders of Pakistan and on 14 May 2011, the National Assembly of Pakistan passed a resolution stating that the 'unilateral actions... [including] the continued drone attacks on the territory of Pakistan, are not only unacceptable but also constitute violation of the principles of the Charter of the United Nations, international law and humanitarian norms and such drone attacks must be stopped forthwith' (NA 2011). This resolution was passed after an 11-hour session discussing the issue of American attacks on Pakistani territory including the raid that led to the capture and killing of Osama bin Laden (Rodriguez 2011). However, within barely forty-eight hours of the passage of that resolution, a drone attack was conducted that led to the deaths of nine people (Cloughley 2011). Regardless of whether that particular attack and others that came afterwards ended up targeting militants, the episode has had major symbolic implications by revealing Pakistan's sheer helplessness concerning the matter of drone strikes on its own territory. The Obama administration may have claimed its ongoing support for democracy in Pakistan through its words but the consequences of its actions have not always contributed to the aim of supporting Pakistan's key democratic institution, its National Assembly.

Conclusion

This contribution argues that the policy of using predator strikes cannot be labelled as a responsible position when measured against the benchmarks of legality, legitimacy and prudence. Given the complexity of the situation in the region, using the drones may be the 'least bad policy choice' for the time being (Byman 2009). However, merely being the 'least-bad' option or an

'effective' policy does not necessarily make these strikes part of a 'responsible' policy. In order for an action to be labelled as a 'responsible' one, it has to be assessed in a much wider framework – something this contribution has done. It has stressed the need to not solely focus on the tally of civilian or militant deaths as the only benchmarks for assessment. To take the commonly held view that drone strikes are 'good' if they hurt militants and 'bad' if civilians are affected tackles the issue of responsible statecraft neither directly nor adequately. This is not to downplay civilian deaths, but in order for the policy of drone strikes to be classified as a responsible approach, the unintended casualties must be seen as part of a much wider framework based on the ideas of great-power responsibility.

Such a discussion will also be essential when discussing the future of this policy in order to either make it more effective (Bergen and Tiedemann 2011) or to abandon it altogether. For Bergen and Tiedemann (2011), the use of drones should be taken over by the US military from the CIA, as doing so would lead to military lawyers ensuring that strikes conform to the laws of war, as well as guaranteeing establishment of a mechanism through which compensation could be paid for accidental damage to civilian lives and properties. Whatever the future of this approach may be, in its current form it cannot be characterised as a responsible one when purportedly promoting Washington's counterterrorism efforts.

Acknowledgements

The author is thankful to three anonymous reviewers of this article for their helpful comments and feedback. Thanks are also due to Dr James Worrall.

Notes

¹ Thanks to an anonymous reviewer of this article for this point.

² It includes strikes started in 2004 till 19 August 2011 (see Roggio and Mayer 2011).

³ According to the US Department of Defense, a preemptive action is 'an attack initiated on the basis of incontrovertible evidence that an enemy attack is imminent' while a preventive attack is 'initiated in the belief that military conflict, while not imminent, is inevitable, and that to delay would involve greater risk' (quoted in Kroning 2003).

⁴ The Columbian attack took place in March 2008 whereas Turkey has attacked Northern Iraq on numerous occasions (see Waisberg 2009, p. 477 and p. 482).

⁵ For details of the work conducted by that panel see UN Report (2004).

⁶ For more on the issue of mistaken identity in targeted killings, see Gross (2009, p. 119).

⁷ For details see 'Pashtunwali/Pashtunwaali,' The Global Security, <http://www.globalsecurity.org/military/world/pakistan/pashtunwali.htm>.

⁸ The Pakistani ambassador to the US quoted in Harrison (2007). See also Jones (2009, p. xxviii).

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